Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

SCOTT THOMAS PHELPS,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition For A Writ of Certiorari
To The Minnesota Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

WHERE NO TRAFFIC VIOLATION OR CRIMINAL CONDUCT HAS OCCURRED, WHERE THE ONLY PURPORTED BASIS OF PETITIONER'S STOP WAS THE OFFICER'S FEELING THAT THE DRIVER AND PETITIONER WERE UNDER THE AGE OF 21, AND WHERE THE OFFICER DID NOT ARTICULATE ANY OBJECTIVE BASIS FOR THAT FEELING, WAS THE RESULTING STOP CONTRARY TO TERRY V. OHIO?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PARTIES TO THE PROCEEDING BELOW	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTES	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	6
CONCLUSION	14
APPENDIX	15

TABLE OF AUTHORITIES

Cases	Page
Adams v. Williams, 407 U.S. 143, 146 (1972)	9,11,12
Alabama v. White, 496 U.S. 325, 326-27 (1990)	9
Brinegar v. United States, 338 U.S. 160, 176 (1949)	9
Brown v. Texas, 443 U.S. 47, 51 (1979)	8,10,13,15
Camara v. Municipal Court, 387 U.S. 523, 534 (1967)	7
Delaware v. Prouse, 440 U.S. 648, 654 (1979)	7
Florida v. Royer, 460 U.S. 491, 493-94 (1983)	9
Illinois v. Gates, 462 U.S. 213, 231 (1983)	9
I.N.S. v. Delgado, 466 U.S. 210, 217 (1984)	8
Mapp v. Ohio, 367 U.S. 643 (1961)	9
Maryland v. Wilson, 519 U.S. 408 (1997)	9
Minnesota v. Dickerson, 508 U.S. 366 (1993)	8
Ohio v. Robinette, 519 U.S. 33, 35 (1996)	9
Ornelas v. United States, 517 U.S. 690, 695 (1996)	9,14
Pennsylvania v. Labron, 518 U.S. 938, 939 (1996)	8,9

Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) 8

People v. Moorhead, 308 N.E.2d 381, 386 (Ill. App. 1994) 11

Reid v. Georgia, 448 U.S. 438, 440 (1979) 10,11,13

State v. Cripps, 533 N.W.2d 388, 392 (Minn. 1995) 13

State v. Graciano, 653 F.2d 683, 686 (Ariz. 1992) 11

State v. Johnson, 444 N.W.2d 824, 825-26 (Minn. 1989) 13

State v. LaBarre, 292 Minn. 228, 237, 195 N.W.2d 435, 441 (1972) 12

State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980) 5

State v. Valdez, 56 F.2d 1006, 1009-10 (Or. 1977) 11,13

Terry v. Ohio, 392 U.S. 1 (1968) 6,7,8,10,12,13,15,16

United States v. Brignoni v. Ponce, 422 U.S. 873, 880 (1975) 19

United States v. Cortez, 449 U.S. 411, 417 (1984) 8,9,11,13

United States v. Fletcher, 91 F.3rd 48, 51 (8th Cir. 1996) 11

United States v. Granderson, 511 U.S. 39 (1994) 14

United States v. Green, 52 F.3rd 194, 199

(8th Cir. 1995) 11

United States v. Hensley, 469 U.S. 221, 230 (1985) 9

United States v. Leon, 468 U.S. 897 (1984) 10

United States v. Montoya, 473 U.S. 531, 541 (1985) 8

United States v. Sharpe, 470 U.S. 675, 686, 687 (1985) 8

United States v. Sokolow, 490 U.S. 1, 7 (1989) 8,10,11

Whren v. United States, 517 U.S. 806, 809 (1996) 9,12

Wilson v. State, 847 F.2d 215 (Wy. 1994) 12

Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979) 8,11

Rules

Rule 117, subd. 2(a)(c)(d), Minnesota Rules of Civil Appellate Procedure 6

Rule 29.04, Minnesota Rules of Criminal Procedure 6

Statutes

28 U.S.C. 1254(1) 1

Minn. Stat. §152.025, subd. 2, subd. 3 2, 5

Other

Lafave, Search and Seizure, 3rd. Ed. Sec. 9.4(a),
p. 139 (West 1996) 10

The Petitioner, **Scott Thomas Phelps**, Petitions for a Writ of Certiorari to review the Judgment of the Minnesota Supreme Court and the Minnesota Court of Appeals.

PARTIES TO THE PROCEEDINGS BELOW

Scott Thomas Phelps

State of Minnesota

OPINIONS BELOW

The unpublished opinion the Minnesota Court of Appeals, the Order of the Minnesota Supreme Court denying Mr. Phelps' Petition for Further Review and the Becker County District Court's Memorandum and Order are appended.

JURISDICTION

The Order of the Minnesota Supreme Court denying Mr. Phelps' Petition for Review was dated July 16th, 1998. The Judgement, also appended, was filed on August 3, 1998. Jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...

STATUTE

> Minn. Stat. §152.025, subd. 2 provides: A person is guilty of controlled substance crime in the fifth degree if: (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in schedule I, II, III, or IV, except a small amount of marijuana.
>
> Subd. 3. Penalty. (a) A person convicted under subdivision 1 or 2 may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000.00, or both.

STATEMENT OF THE CASE

On the 3rd of July, 1996, Scott Fox, a Pelican Lake Police Officer, (T. 4)[1], was on his bicycle and in uniform, armed as well, (T. 5, 22), this in the town of Detroit Lakes, Minnesota. (T. 5). The time: 10:45 p.m. (T. 6). According to Fox, "there was a fair amount of traffic that night" on Washington Avenue, (T. 7), stop and go, ten to fifteen miles per hour at best. (T. 28).

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[1] T. refers to the transcript generated at the May 3, 1997, motions hearing.

In the southbound lane drove a blue pickup truck with a topper on the back. (T. 7). The truck's tailgate, roughly two feet high, (T. 26) was closed, but the door to the topper was open, (T.7), and inside Fox could see "a case of beer." "I believe it was Bush beer," he said. "It didn't look like any of it had been removed yet," (T. 8), the case "completely enclosed," i.e., unopened. (T. 27). The back of the pickup was distinct from the passenger compartment. (T. 30).

Though he saw no moving violation, Fox decided to stop the truck. (T. 23). He rode his bicycle up to the driver's side. There he viewed no open bottles, nor drugs, nor consumption. (T. 29-30, 42). Said Fox: "I didn't feel that either the driver or the passenger were old enough to be in possession of the beer and at that time I motioned for them to pull to the curb." (T. 9) (emphasis added). The drinking age in Minnesota is twenty-one years. (T. 9).

On cross, this colloquy:

Q. Now, Officer, with respect to your taking a look at the individuals who were in the cab of the S-10 as you rode up to it, alongside it on your bike, you would agree that people who are well above the age of 21 can look younger than 21?

A: Some do, yes.

Q. And you would agree with me, would you not, Officer, that those who are well below the age of 21 can look older than that?

A. Yes, some do.

(T. 42).

Once next to the cab, Fox said he could smell the odor of alcohol "coming from within the vehicle." (T. 10). On the passenger's side floor, beneath where Petitioner Phelps was seated, there appeared to be a wet spot, which, the officer opined, "would have been unusual for that particular night because it was not raining outside." (T. 10). "With the moisture on the floor, usually that is an indication that there is a can of beer that has been tipped over inside the vehicle or some fluid has been tipped over inside the vehicle." (T. 10).

The driver, Bunnell, was nineteen, (T. 33, 35), Phelps had just turned eighteen. (T. 11). They were asked to exit and did, whereupon Fox conducted a search of the passenger compartment, and found a can of beer, its seal broken, (T. 12), located between the passenger and driver's seat. (T. 13).

In the bed of the pickup, officer Fox seized four cases of beer, "stacked up on top of each other," and "some other wine coolers . . ." (T. 13).

Fox returned to the extended cab. (T. 14). A Coleman brand cooler rested in back of the driver's seat, three feet by a foot and a half in size, green in color. (T. 36). He opened it, looking for alcohol. (T. 15). Fox testified that "there were other cans of beer that were inside the cooler and there was a clear baby food jar (like a Gerber's) that had a film canister inside it also." (T. 15; 38). When he saw the jar, officer Fox thought not of film, but "certain drugs", e.g. methamphetamine, heroin, LSD. (T. 17; 18). Inside were four folded pieces of paper, termed "bindles." (T. 17). Each contained "a tannish powder" resembling methamphetamine. (T. 18).

With this discovery Fox formally arrested Petitioner and Bunnell for possession of narcotics, and underaged possession of alcohol. (T. 39). They were handcuffed and later booked, (T.45-46), the truck towed into the police station, an inventory search accomplished. (T. 41). From the glove box, police seized a snort tube, a razor blade. (T. 48). From a fanny pack found in the extended cab portion, similar items. (T. 49).

On October 17, 1996, Phelps was charged by complaint with a violation of Minn. Stat. §152.025, subd. 2(1), possession of controlled substance crime in the fifth degree, a felony. He moved to suppress the initial detention, his subsequent arrest, and the truck search. The Honorable William E. Walker, Judge of the Becker County District Court, denied the motion on May 13, 1996. Without saying why, the Court concluded that "the officer did possess the requisite individualized reasonable suspicion to conduct the investigatory traffic stop." (Appendix at p. 13).

The Court also found the resultant search of the pickup fell within the automobile exception. The container, the Court held, could reasonably contain evidence "related to the offense of possession of alcohol under age." (Appendix at p. 5).

Petitioner was convicted on the basis of the stipulated record, similar to a Rule 11(a)(2), Fed.R.Crim.P., plea. See State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980). He appealed the search issue to the Minnesota Court of Appeals, which affirmed, finding that since "(t)he topper's rear door was open, . . . the beer was accessible to Phelps and the driver. Under the doctrine of constructive possession, the facts were sufficient to support a reasonable suspicion that Phelps or the driver possessed the beer." Slip Op. pp. 4-5. The Court also credited Fox's unarticulated feeling that the driver appeared to

be under 21 years as "sufficient to support a reasonable suspicion that they were not old enough to legally possess alcohol." Id.

Phelps requested further review in the Minnesota Supreme Court, see Rule 29.04, Minnesota Rules of Criminal Procedure, and Rule 117, subd. 2(a)(c)(d), Minnesota Rules of Civil Appellate Procedure, to no avail.

Having exhausted his appellate remedies, he files this Petition.

REASON WHY THE WRIT SHOULD BE GRANTED

We ask the Court to revisit the objectivity required by Terry v. Ohio, 392 U.S. 1 (1968), and whether the landmark holding has been eviscerated where the basis of the stop is solely based upon an unarticulated appearance.

The facts in Terry are familiar to every law student. Detective Martin McFadden, while on patrol in downtown Cleveland, had his attention intuitively drawn to two men, one being Mr. Terry. McFadden hadn't seen them before, but in thirty-nine years of street work he found "they didn't look right to me at the time." Id. at 5. From roughly a football field away, McFadden took stock. "I get more purpose to watch them when I seen their movements," he testified. Id. at 6. He saw the second man "strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece -- in all, roughly a dozen trips." Id. They conferred with a third man, and by this time McFadden "had become thoroughly suspicious." Id.

at 6. He felt they were "casing a job, a stick-up." Id.

Fearing "they may have a gun," Id., McFadden pursued. He identified himself, and asked their names, and when the men "mumbled something" in response, McFadden grabbed Terry. In Terry's left breast pock of his overcoat, McFadden "felt a pistol," what would turn out to be a .38 caliber revolver. Id. at 7. Thus Terry was charged with carrying a concealed weapon.

Whether Detective McFadden's action passed 4th Amendment muster, this Court held, was to be "judged against an objective standard: would the facts available to the officer at the moment of his seizure 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." Id. at 21-22. "Anything less would invite intrusions upon constitutionally guaranteed rights because of nothing more than inarticulate hunches, a result this Court has refused to sanction." Id. at 22. In Terry's case, "the sole justification of the search . . . (was) the protection of the police officer and others nearby . . ." Id. at 29.

A utilitarian approach this Court would employ. "(T)he need to search" was balanced "against the invasion which the search (or seizure) entails." Terry, 392 U.S. at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 534 (1967)); see also Delaware v. Prouse, 440 U.S. 648, 654 (1979)("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests").

Terry taught the law enforcement community that the facts used as a basis for the stop must not only be articulated; i.e., the officer must explain why he acted the way he did, but

also be of the moment. Brown v. Texas, 443 U.S. 47, 51 (1979); Adams v. Williams, 407 U.S. 143, 146 (1972), present when the nefarious "may be afoot." Terry, 392 U.S. at 27. See also United States v. Cortez, 449 U.S. 411, 417 (1984)("an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.")

The key factor in play for Officer McFadden that justified his initial stop, but wholly absent here for Officer Fox, was the danger implicit in the activity seen: the casing of the store, robbery, the suspected presence of a gun, that a crime was about to be committed. Terry, 392 U.S. at 29; see also Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977)(driver had .32 pistol in his sports jacket; search and seizure justified). The case law that has followed has held the Terry stop has a protective predicate, 392 U.S. at 29, and still does. Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979)(no evidence patrons of bar searched were armed); Minnesota v. Dickerson, 508 U.S. 366 (1993)(Terry search limited where officer made "no claim that he suspected" the object seized "to be a weapon," hence justification for search --- the protection of police officer and others -- was missing).

Moreover, Terry and its progeny have consistently called for scrutiny of what the officer has done. The Fourth Amendment requires "some minimal level of objective justification" for making a stop, I.N.S. v. Delgado, 466 U.S. 210, 217 (1984); United States v. Sokolow, 490 U.S. 1, 7 (1989), a level less demanding than probable cause, United States v. Montoya, 473 U.S. 531, 541, 544 (1985). This Court, of course, will not "indulge in 'unrealistic second guessing.'" Id. at 542 (quoting United States v. Sharpe, 470 U.S. 675, 686, 687 (1985)).

As time has gone by, this Court has provided some deferential wiggle room while not defeating the Terry teaching. "Articulating precisely what 'reasonable suspicion' . . . mean(s) is not possible." Ornelas v. United States, 517 U.S. 690, 695 (1996). It must be based upon practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Illinois v. Gates, 462 U.S. 213, 231 (1983)(citing Brinegar v. United States, 338 U.S. 160, 176 (1949)). Ergo the Terry standard is not "finely turned." Gates, 462 U.S. at 235. The arresting officer's specific personal observations still count the most, Sharpe, 470 U.S. at 682 n. 3, the inferences drawn from his experience level, Ornelas, 517 U.S. at 699, the totality of circumstance. Cortez, 449 U.S. at 418-19.

A plethora of Terry stops have been litigated, including those involving the automobile. Traveling under an assumed name the police know about spells doom, Florida v. Royer, 460 U.S. 491, 493-94 (1983), as does the defendant being wanted, via flyer, by another police department, United States v. Hensley, 469 U.S. 221, 230 (1985), or an informant's tip corroborated, Adams v. Williams, 407 U.S. 143 (1972); Alabama v. White, 496 U.S. 325, 326-27 (1990), or when an officer actually sees the contraband placed into the car trunk, Pennsylvania v. Labron, 518 U.S. 938, 939(1996), or, unlike here, when a passenger is ordered out of the car for the driver's traffic violation, speeding say, Maryland v. Wilson, 519 U.S. 408 (1997), or, also unlike here, when the driver himself ignores the law, Ohio v. Robinette, 519 U.S. 33, 35 (1996), or when the arresting officer sees the contraband in the driver's compartment, in plain view, post an arrest for actual traffic violation, Whren v. United States, 517 U.S. 806, 809 (1996).

And while the law of search and seizure has evolved, surely, compare Mapp v. Ohio, 367 U.S. 643

(1961)(exclusionary rule deemed "essential" and "makes very good sense.") with United States v. Leon, 468 U.S. 897 (1984)(exclusionary rule of no import when police officer obtains a defective warrant in good faith), the Terry standard has remained firm. The articulation must be more than "inchoate and unparticularized suspicion or hunch." Terry, 392 U.S. at 27, quoted in Sokolow, 490 U.S. at 7 (emphasis added). The requisite articulation continues to be "purely objective . . . " LaFave, Search and Seizure, 3rd Ed. Sec. 9.4(a), p. 139 (West 1996)(emphasis added). The state always must show "a particularized and objective basis," Cortez, 449 U.S. at 417-418. Generalized suspicions are not allowed to carry the day, Ybarra, 444 U.S. at 92-93.

Closer to our issue, this court has been "unwilling" to allow stops based solely upon the suspect's appearance. United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975). For example, in Brown v. Texas, supra, the fact that the defendant was "in a neighborhood frequented by drug users, standing alone. . . (was) not a basis for finding that (he) was engaged in criminal conduct." 443 U.S. at 52. Indeed, the only reason for Mr. Brown's stop was to "ascertain (the defendant's) identity." Id. at 52. As such it was "not based on objective criteria." Id. at 52. To be more than clear, this Court went the next logical step: when a stop is not based upon "objective criteria, the risk of arbitrary and abusive police practice exceeds tolerable limits." Id. at 52. "(A)n individual's expectation of privacy is not subject to arbitrary invasions soles at the unfettered discretion of officers in the field." Id. at 51.

A similar result was reached in Reid v. Georgia, 448 U.S. 438, 440 (1979), where the interdiction of a defendant at an airport who had a) arrived from a source city, b) in the early morning, c) with another and it appeared to the arresting officer

the two were trying to conceal their association, and d) they had no luggage other than shoulder bags, Id. at 441, was rejected. The fact that the defendant "looked backward" as he proceeded through the concourse was consistent with innocence, that he had a companion meaningless. Id. at 441. Accord United States v. Green, 52 F.3rd 194, 199 (8th Cir. 1995)(airport police officer did not have basis when defendant's conduct matched a broad category of innocent people: nervousness, sunglasses, no eye contact with the watching authorities, traveling alone, baggy clothes); United States v. Fletcher, 91 F.3rd 48, 51 (8th Cir. 1996)(no reasonable suspicion even though defendant deplaned from source city, and was picked up by woman driving truck with supplemental gas tanks, who herself came from an address of known narcotics activity); State v. Graciano, 653 F.2d 683, 686 (Ariz. 1992)(inability of police officer to articulate why the driver was stopped other than the darkness of his skin and unknown age did not meet Terry standard); State v. Valdez, 56 F.2d 1006, 1009-10 (Or. 1977)(stop and resulting arrest suppressed where officer would not articulate reason other than defendant's dapper dress and otherwise sharp look; that he "didn't look right" found insufficient); People v. Moorhead, 308 N.E. 2d 381, 386 (Ill. App. 1994)(officer could not articulate why the defendant was stopped other than how he carried his sweater, and the fact that he fit the general description of a male who committed a robbery three hours earlier); Wilson v. State, 874 F.2d 215 (Wy. 1994)(arresting officer's testimony "fails to disclose that he formulated any reasonable suspicion.").

In sum, "(t)his demand for specificity in the information upon which police actions is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Cortez, 449 U.S. at 418. Only with a particularized objectivity is a police officer allowed to go the next step to ascertain identity. Adams,

407 U.S. at 146; Terry, 392 U.S. at 6-7, 22-23. As such, subjective motivations can't ever be allowed to defeat the law's objective qualities. Whren, 517 U.S. at 814-15.

The nature of our country's social contract between the citizen and the state is perversely altered when he may be stopped on the pretext of appearance. Brignoni-Ponce, 422 U.S. at 883. Applying Terry jurisprudence, the issue is whether Officer Fox had an articulable basis beyond a hunch, a subjective urge; he could see no traffic violation, nor could he articulate his feeling, a feeling that falls far from a standard of pure objectivity. Concomitantly, whether the judiciary, responsible for reviewing an officer's action, can articulate the basis for the stop, which the Minnesota Courts could not.

What caught Officer Fox's attention was a glimpse of a case of beer in the back of a pickup truck, unopened, unaccessible from the driver's compartment. The Minnesota Court of Appeals found a form of constructive possession, that "(d)ominion and control can be shared with others." Slip Op. at page. 4. (citing State v. LaBarre, 292 Minn. 228, 237, 195 N.W.2d 435, 441 (1972)). "The topper's rear door was open, so the beer was accessible to Phelps and the driver." Id.

This begs the question. The stop was based on a feeling of that the driver and Petitioner were underaged, not the presence of the beer cases. A closed case of beer within a pickup truck's bed means nothing unless the driver is underaged. Officer Fox did not see illegality under way in a cardboard box holding aluminum cans.

No, this case spins around the idea of being young. The Court of Appeals found that "Fox's testimony that he observed Phelps and the driver through the window of the truck and they

appeared to be under age 21 was sufficient to support a reasonable suspicion that they were not old enough to legally possess alcohol." (citing State v. Cripps, 533 N.W.2d 388, 392 (Minn. 1995)). But why they "appeared to be under the age of 21" is something the Officer could not describe and nor could the Minnesota Courts. Was it lack of facial hair, perhaps jewelry, overall dress, the hairstyle of the times, a telling tatoo, tone of voice? The predicate facts of an appearance need be articulated to elevate a hunch to an articulable suspicion; no attempt was made to satisfy Terry.

The Court of Appeals also misread Cripps, a case which echoed Terry's initial requirement that the arresting officer "point to objective facts." Id. A case involving a young woman's bar arrest for underaged drinking, Cripps held the arresting officer "failed to articulate a sufficient basis to demonstrate that she possessed an individualized suspicion." When stopping a young adult the officer "may not base his or her conclusion on a 'hunch.'" Id. (quoting State v. Johnson, 444 N.W.2d 824, 825-26 (Minn. 1989)). Absent just such an articulation, the Minnesota Supreme Court could not find "that the seizure was justified." Id. at 392. The Minnesota Supreme Court's decision in Cripps with respect to the 4th Amendment is unequivocally in support of Phelps' Petition.

Referring to no objective facts, certainly not a pure skin tone, the color of Bunnell's hair, all officer Fox really said, echoing Spinoza's thought, 'I think he is, therefore he is.' Which is a lot like saying I suspect, therefore a crime has been committed, an approach rejected over and over again, beginning with Terry and going forward. See Brown, 443 U.S. at 52; Reid, 448 U.S. at 441.

The Minnesota Court of Appeals' de novo review of the record, Ornelas, 517 U.S. at 697, featured only a transcript that Officer Fox "didn't feel that either the driver or the passenger were old enough . . ." (T. 9). There is no way to challenge a heart's secret. If the standard is one of feeling, a Freudian largess, a gut subjectivity based upon the deep subconscious, every stop becomes justified. Terry was about getting away from individual whims and caprices with respect to the loss of privacy inherent in a police stop.

Certiorari ought to be granted, for the Minnesota Courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10 (c), Rules of the Supreme Court.

CONCLUSION

Based upon the foregoing, Petitioner Scott Thomas Phelps requests Certiorari be granted.

Dated: October 29, 1998

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INDEX TO APPENDIX

1. Unpublished opinion of the Minnesota Court of Appeals

2. Order of Minnesota Supreme Court denying Petition for Further Review

3. Becker County District Court's Order and Memorandum

4. Judgment of the Minnesota Court of Appeals

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1996).

STATE OF MINNESOTA
IN COURT OF APPEALS
C5-97-1718

State of Minnesota,
Respondent,

vs.

Scott Thomas Phelps,
Appellant.

Filed May 19, 1998
Affirmed
Foley, Judge *

Becker County District Court
File No. K7-96-1259

Hubert H. Humphrey III, Attorney General, Paul R, Kempainen, Assistant Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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John H. Erickson, Erickson Law Offices, 319 South Sixth Street, P.O. Box 525, Brainerd, MN 56401 (for appellant)

Considered and decided by Lansing, Presiding Judge, Crippen, Judge, and Foley, Judge.

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*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10

UNPUBLISHED OPINION

FOLEY, Judge

On appeal from a conviction for fifth-degree controlled substance crime, appellant Scott Thomas Phelps challenges the district court's denial of his motion to suppress evidence discovered during a search of a vehicle in which he was a passenger, and the statement he made to police following his arrest. We affirm.

FACTS

Phelps was a passenger in a pick-up being driven by his friend. While conducting bicycle patrol, Officer Scott Fox saw a full case of beer in the back of the truck. The beer was visible through the open door of the truck's topper. Fox rode his bicycle alongside the truck until he was next to the driver's window, through which he observed Phelps and the driver.

Because Phelps and the driver appeared to Fox to be under age 21, Fox stopped the truck. While standing next to the driver's window, Fox smelled an odor of alcohol coming from within the truck and saw what appeared to be a wet area on the floor of the truck's passenger side. Fox testified that based on his experience, because it was not raining, the wet area indicated the possibility of open beer cans in the truck.

After Phelps and the driver produced identification that showed both were under age 21, Fox searched the truck for alcohol. In the front passenger area, between the passenger seat and the driver seat, Fox found a partially full, open beer can; he also found a couple of empty beer cans in the passenger area. Fox next searched the truck's box, where he found four cases of beer and some wine coolers.

Finally, Fox searched the back seat of the truck's passenger area. He found a cooler behind the driver's seat and opened it to look for more beer. In the cooler, Fox found beer cans and, on top of some ice, a clear baby food jar with a film canister inside. Fox testified that certain types of drugs are commonly transported in film canisters and on ice to keep them from deteriorating. In the film canister, Fox found four folded paper bindles, which are commonly used to transport power narcotics. Fox opened a bindle and found a substance that looked like and was later identified as methamphetamine.

Fox arrested Phelps and the driver for underage possession of alcohol and possession of a controlled substance. Phelps made a voluntary statement to police, admitting that the methamphetamine belonged to both him and the driver.

DECISION

When the material facts are undisputed, the district court's decision on a motion to suppress is a question of law subject to de novo review. State v. Paul, 548 N.W.2d 260, 264 (Minn. 1996); State v. Schauer, 501 N.W.2d 673, 674 (Minn. App. 1993).

I.

Phelps argues that Fox lacked sufficient basis for an investigatory stop. To justify an investigatory stop, the "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts," support a reasonable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968). An officer "may draw inferences and deductions that might elude an untrained person." State v. Cripps, 533 N.W.2d 388, 391 (Minn. 1995).

It is unlawful for a person under age 21 to

> possess any alcoholic beverage with the intent to consume it at a place other than the household of the person's parent or guardian. Possession at a place other than the household of the parent or guardian creates a rebuttable presumption of intent to consume it at a place other than the household of the parent or guardian.

Minn. Stat. § 340A.503, subd. 3 (1994).

Phelps argues that Fox's observation of beer in the truck's box did not support a reasonable suspicion that Phelps or the driver possessed alcohol. The state can prove possession by showing constructive possession. See State v. Florine, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610-11 (1975) (explanation of constructive-possessing doctrine); Minn. Stat. § 169.122, subd. 2 (1996)(definition of possession). If police find a substance in a place to which more than one person had access, to prove constructive possession, the state must show that "there is a strong probability (inferable from other

evidence) that defendant was at the time consciously exercising dominion and control over it." Florine, 303 Minn. at 105, 226 N.W.2d at 611. Dominion and control can be shared with others. State v. LaBarre, 292 Minn. 228, 237, 195 N.W.2d 435, 441 (1972).

Fox saw a full case of beer in the truck's box. The topper's rear door was open, so the beer was accessible to Phelps and the driver. Under the doctrine of constructive possession, the facts were sufficient to support a reasonable suspicion that Phelps or the driver possessed the beer.

Citing the open bottle law, Phelps argues that the underage possession law should be construed as inapplicable to vehicle areas not normally occupied by the driver and passengers. We disagree. Unlike the underage possession law, the open bottle law expressly sets forth an exception for vehicle areas not normally occupied by the driver and passengers. Minn. Stat. § 169.122, subd. 2.

Phelps also argues that the stop was based on Fox's mere hunch that Phelps and the diver were under age 21. Fox's testimony that he observed Phelps and the driver through the window of the truck and they appeared to be under age 21 was sufficient to support a reasonable suspicion that they were not old enough to legally possess alcohol. See Cripps, 533 N.W.2d at 392 ("officer can justify an investigative seizure of a person who is in a bar if that person appears to the officer to be under the legal age to consume alcohol"). The evidence was sufficient to support a reasonable suspicion that Phelps or the driver was violating Minn. Stat. § 340A.503, subd. 3.

II.

Phelps next contends that Fox lacked probable cause to search the container in which the methamphetamine was found.

> [P]olice may search a vehicle without a warrant, including any closed containers within the vehicle, if they have probable cause to believe the search will result in a discovery of evidence or contraband.

State v. Search, 472 N.W.2d 850, 852 (Minn. 1991). Probable cause means a reasonable belief based on the totality of the circumstances considered in light of the officer's experience and observations. State v. Nace, 404 N.W.2d 357, 360 (Minn. App. 1987), review denied (Minn. June 25, 1987).

Phelps does not dispute that Fox had probable cause to search the truck's passenger area for beer or that Fox had probable cause to look in the cooler for beer. Phelps argues that Fox lacked probable cause to search the baby food jar and the film canister because he was searching them for a controlled substance, not alcohol. If an officer gains probable cause to search for a controlled substance during a legal search for alcohol, the scope of the search can be expanded to include places where there is probable cause to believe the controlled substance will be found. See State v. Veigel, 304 N.W.2d 900, 901-02 (Minn. 1981)(when officers discovered marijuana in vehicle's passenger area while conducting lawful search for alcohol, probable cause to search locked glove compartment for alcohol was not necessary because there was probable cause to search for controlled substances).

When Fox opened the cooler to look for more beer, he saw a clear baby food jar with a film canister inside. Fox testified that certain types of drugs are commonly transported in film canisters and on ice to keep them from deteriorating. Fox's observation of the film canister in the baby food jar on top of ice in the cooler, considered in light of his experience and training, was sufficient to provide him with probable cause to search the film canister and the baby food jar.

III.

Finally, Phelps argues that Fox lacked probable cause to arrest him. Probable cause to arrest exists when

> the objective facts are such that under the circumstances, a person or ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed [by the suspect].

In re Welfare of G.M., 560 N.W.2d 687, 695 (Minn. 1997).

Phelps appeared to Fox to be under age 21. Fox smelled a strong odor of alcohol coming from the truck; he observed a wet spot on the floor of the front-seat passenger area, indicating the possibility of open beer cans in the truck; in the front seat of the truck's passenger area, between the passenger seat and the driver's seat, Fox found a partially-full, open beer can; Fox also found a couple of empty beer cans in the truck's passenger area; and in the extended-cab area of the truck, Fox found a cooler containing beer cans. These facts were sufficient to support a probable cause determination that Phelps was exercising dominion and control over the beer in the passenger area of the truck and, thus, had violated Minn. Stat. §

340A.503. Because Fox had probable cause to arrest Phelps, Phelps' statement to police was admissible.

5/8/98

STATE OF MINNESOTA

IN SUPREME COURT

C5-97-1718

State of Minnesota,

Respondent,

vs.

Scott Thomas Phelps,

Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Scott Thomas Phelps for further review be, and the same is, denied.

Dated: July 16, 1998

BY THE COURT:

Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF BECKER SEVENTH JUDICIAL DISTRICT

State of Minnesota, Court File No. K7-96-1259
Plaintiff,

vs. **ORDER**

Scott Thomas Phelps,
Defendant.

The above-entitled matter came on for hearing before the Honorable William E. Walker, Judge of District Court, on the 3rd day of March, 1997.

Joseph A. Evans, Attorney at Law, appeared on behalf of the Plaintiff. John H. Erickson, Attorney at Law, appeared on behalf of the Defendant.

NOW, having duly considered the arguments and memoranda of counsel, the documents and proceedings herein, together with the applicable law, this Court **ORDERS**:

THAT, Defendant's motion to suppress all evidence obtained from the traffic stop for lack of reasonable suspicion to stop the vehicle is **DENIED**.

THAT, Defendant's motion to suppress evidence and statements obtained against Defendant on the basis that the search incident to the detention was unlawful is **DENIED**.

THAT, Defendant's motion to dismiss the charges for lack of probable cause is **DENIED**.

THAT, the attached memorandum is made a part of this **ORDER**.

Dated this 13th day of May, 1997.

William E. Walker
Judge of District Court

MEMORANDUM

According to the complaint and testimony, Police Officers Scott Fox and Brian Fox were on bike patrol in Detroit Lakes on July 3, 1996, when they first saw a pickup truck in which Defendant Scott Phelps was a passenger. The tailgate of the pickup was closed, but the back door of the topper was open allowing Officer Scott Fox to view an unopened case of beer placed in plain sight in the cargo area of the truck. Because traffic was moving slow, Officer Scott Fox was able to observe Defendant and the driver of the truck when they first passed him. Upon seeing the beer, Officer Fox decided to ride up along side of the vehicle to view the driver and passenger a second time because he suspected they may be under age. Upon viewing the appearance of the driver and passenger, Officer Fox concluded that they did not appear to be old enough to be in possession of alcohol. Officer Fox stopped the vehicle at this point to investigate. Upon investigation, Officer Fox indeed discovered that Defendant was age 18 and the driver was 19. Pursuant to further investigation, the officers searched the truck and discovered methamphetamine or "crank" stored in a cooler within the passenger compartment of the truck. Defendant and

the driver stated they had purchased the "crank" together. Subsequently, Defendant was charged with Possession of a Controlled Substance in the Fifth Decree, in violation of Minn. Stat. §609.05, Subds. 1 and 2, and 152.025, Subds. 2(1) and 3(a).

Defendant moved to suppress the evidence associated with the officer's investigatory stop on the grounds that his constitutional rights were violated. First, Defendant contends the officer did not have reasonable suspicion to justify an investigatory stop, and, therefore, moves to suppress the evidence. Second, Defendant challenges the search which led to the discovery of the methamphetamine. Defendant argues that this evidence should be suppressed as the product of an unlawful search and that his subsequent statements should be suppressed under the fruit of the poisonous tree doctrine. Finally, Defendant has moved to have the complaint dismissed for lack of probable cause following suppression of the evidence against him. The Court denies Defendant's motions in their entirety for the following reasons.

The first issue is whether an officer may seize a person whom he believes is in possession of alcohol under age based on the officer's opinion of that person's age. If an officer is justified in making such an inference, then the investigatory stop of the vehicle in which Defendant was a passenger was supported by reasonable articulable suspicion. However, if Officer Scott Fox did not have a reasonable suspicion to justify stopping the vehicle, then the entire investigation was tainted from the start, and all evidence obtained should be suppressed and this matter dismissed.

The standard necessary to justify an investigatory stop for questioning requires an officer have a particular and

objective basis for suspecting the driver of criminal activity. State v. Johnson, 444 N.W.2d 824, 827 (Minn. 1989). The Minnesota Supreme Court has held that the officer's suspicion of criminal activity must be based on more than an unarticulated hunch; the officer must be able to point to something particular that objectively supports the officer's suspicion of criminal activity. Id. at 825-826. In addition, a trained police officer is entitled to draw inferences on the basis of "all of the circumstances * * * inferences and deductions that might well elude an untrained person," Id. at 826 (quoting United States v. Cortez, 449 U.S. 411, at 418, 101 S.Ct. 690 at 695).

At the hearing, Officer Fox stated specific facts that support his suspicion the law was being violated. The officer testified that the truck was traveling slowly in heavy traffic on a well-lit street when he had the opportunity to view the contents and occupants of the vehicle. He stopped the vehicle based on his inference that the driver and passenger appeared under age 21 and were thus committing the offense of possessing alcohol under age. It is acceptable for an officer with 18 years experience in law enforcement to rely on his experience in judging a person's age under these circumstances. Police are allowed to seize a person in a bar if that person appears to the officer to be under the legal age to consume alcohol. State v. Cripps, 533 N.W.2d 388, 392 (Minn. 1995). Likewise, where the officer in this case saw an unopened case of beer in the back of a pickup truck and the occupants of that vehicle looked under age, the officer was justified in stopping the vehicle. The stop was not based on an unarticulated hunch that the occupants were under age. Rather, Officer Fox testified that he formed his opinion of their age after viewing the occupants twice and concluding, upon the basis of years of experience, that they appeared under age 21.

The fact that the beer was being transported in the rear portion of the truck does not make the act of possession any less illegal where the person in possession of that alcohol is under the legal age. The Court concludes the officer did possess the requisite individualized reasonable suspicion to conduct the investigatory traffic stop. Therefore, Defendant's motion to suppress the evidence as a result of an unlawful stop is denied.

Second, the Defendant challenges the legality of ceratin aspects of the search of the vehicle and moves for suppression of evidence obtained as a result of an unlawful search. Specifically, Defendant argues that the officer did not have probable cause to search the closed containers which contained the controlled substance. The automobile exception to the warrant requirements allows police to "search a vehicle without a warrant, including any closed containers within the vehicle, if they have probable cause to believe the search will result in a discovery of evidence or contraband." State v. Search, 472 N.W. 850, 852 (Minn. 1991). This rule gave Officer Fox authority to search any container that could reasonably contain the object of his search. However, the defendant contends that the scope of the officer's authority to search reached its limit upon entering the cooler. The Court disagrees based on the following.

After stopping the vehicle, Officer Fox determined that both occupants were under age. While speaking with Defendant and the driver at the driver's side window, Officer Fox detected the odor of alcohol and saw a wet spot on the floor by the Defendant. Based on his experience, Officer Fox suspected the wet spot may have been alcohol from an open can or bottle. Pursuant to his investigation, Officer Fox inspected the passenger compartment of the vehicle and discovered an open can still containing some beer and other empty beer cans. He

then searched the rear of the truck, where he had seen the unopened case of beer, and discovered four stacked cases of beer and some wine coolers. Officer Fox returned to the passenger compartment and looked behind the front seat. He saw a cooler, which he reasonably suspected contained more beer. Officer Fox opened the cooler and found additional cans of beer and ice, as well as a clear baby food jar containing a sealed black plastic film canister. Officer Fox testified that, based on his past experience, drugs were commonly transported in these types of containers. Specifically, Officer Fox stated that certain drugs, including methamphetamine, were often kept on ice to prevent deterioration. He also noted the common practice of using dark containers, such as the film canister, to store drugs.

Officer fox opened the jar and the film canister and discovered four folded pieces of paper, referred to as bindles, inside. Officer Fox stated that, based on his experience, he recognized these papers as a common container for powdered narcotics. He unfolded one of the paper bindles and observed a tan colored powder which he believed to be methamphetamine. At this point, Defendant and the driver were placed under arrest.

Defendant argues that Officer Fox did not have probable cause to open the containers which held the methamphetamine because the automobile exception limited the scope of the search to those containers which could reasonably contain evidence related to the offense of possession of alcohol under age. Office Fox admitted that he did not open the jar, film canister and paper bindles in a search for alcohol. Rather, he opened those containers because, upon seeing those particular containers on ice, he believed they may contain illicit drugs.

The Court concludes that Officer Fox had probable cause to believe the baby food jar, film canister and paper bindles contained contraband. The nature of the containers themselves, combined with the fact they were found on ice, gave Officer Fox probable cause to believe they held a controlled substance. The officer's years of experience and specificity with regards to the nature of the containers is pivotal. Therefore, the search of these closed containers was lawful and Defendant's motion to suppress the evidence as the result of an unlawful search is denied.

Because the evidence is not tainted as the product of either an invalid stop or an unlawful search, there is no justification for suppression of evidence or Defendant's subsequent statements to police. Based on the evidence, the Court finds sufficient probable cause to require Defendant to stand trial and the motion to dismiss the complaint for lack of probable cause is denied.

Based on the foregoing, Defendant's motions are denied in their entirety.

W.W.

STATE OF MINNESOTA

___ Supreme Court
State of Minnesota, _X_ Court of Appeals

Respondent,

JUDGMENT

vs.

C5-97-1718
Scott Thomas Phelps, Appellate Court Case Number

Appellant. K7961259
Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgement of the Court below, herein appealed from, to wit, of the District Court within and for the County of Becker be and the same hereby is

affirmed in accordance with unpublished opinion

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT August 3, 1998
Attest: Frederick K. Grittner, Clerk of Appellate Courts

By: Wendy Johnson
Assistant Clerk